UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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MONIQUE DA SILVA MOORE, et al.,

Plaintiffs,

v. 11 Civ. 1279 ALC

PUBLICIS GROUPE and MSL GROUP,

Defendants.

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July 11, 2012
3:50 p.m.

Before:

HON. ANDREW L. CARTER, JR.,

District Judge

APPEARANCES

SANFORD WITTELS & HEISLER, LLP
Attorneys for plaintiffs
BY: STEVEN WITTELS, Esq.
- and -
CLIFFORD CHANCE US, LLP (NYC)
BY: SIHAM NURHUSSEIN, Esq.
Of counsel

JACKSON LEWIS, LLP
Attorneys for defendants
BY: VICTORIA WOODIN CHAVEY, Esq.
JEFFREY BRECHER, Esq.
- and -
MORGAN LEWIS & BOCHIUS, LLP (PA)
BY: PAUL EVANS, Esq.
Of counsel

(In open court)

(Case called)

THE COURT: Good afternoon.

First let's deal with the plaintiffs' objections to Judge Peck's rulings, discovery rulings on May 7th and May 14th. I've reviewed the parties' submissions, obtained the transcript. I will overrule the plaintiffs' objections to Judge Peck's rulings on May 7th and May 14th. I find that his rulings were not clearly erroneous or contrary to law.

Now let's move on to the issues concerning the notice to be sent out. Let's just make sure everyone has each party's proposed notice next to each other and do them side-by-side.

Regarding, first of all, regarding defendants' objection to Publicis Groupe S.A. may be included in the notice, Publicis Groupe S.A. at this point is still a party to the lawsuit and the name should be included in the notice. If at some later point they're dismissed from this action, we can deal with that later. They should be included in the notice.

Let's go looking at the notice section.

MR. WITTELS: Your Honor, I hesitate to interrupt.

May I just make one introductory statement if you don't mind --

THE COURT: Sure.

MR. WITTELS: -- because your Honor obviously has carefully read these and we very much appreciate that.

There is a matter of grave concern to the plaintiffs regarding these notices, and that is that we have learned through our clients, who have learned from current employees, that an e-mail was sent out after your Honor certified this as a collective action. In the e-mail, which we don't have a copy of, and have been unable to get a copy of, the potential class members are members of the women here who were essentially told that there is no merit to this suit, there is going to be a vigorous defense to this suit, and really from what we understand from the tenor of the letter or e-mail, were sort of discouraged not to participate.

Before notice goes out, we would ask that your Honor order the defendants to produce that notice to us and the court so that we can see it and evaluate whether there should be a corrective notice within the notice that your Honor eventually approves rather than having to escort in a secondary fashion.

If we did it through normal course of discovery by asking for it, there would be 30 days and objections. There seems to be no reason not to know what they said. This was apparently authorized by the president, Jim Seconis, the person who sent this of the company. It is sort of a pattern of what has happened in this lawsuit since the beginning of trying to chill people's participation, which your Honor hasn't been involved in the day-to-day but, for example, at the depositions where the defendants engaged in far ranging types of questions

about family members, about their involvement in social media.

If you read their notices and go through it, it is also designed to try to chill them from joining. We would ask as a preliminary matter that that be produced so the court can determine if there should be correctiveness. We believe there should be once we have seen it.

THE COURT: Before I do that, based on your understanding of what is in the e-mail, and let's assume this e-mail exists for argument's sake, the worst case, what would be the corrective action you would be asking me to take?

MR. WITTELS: Many times there are corrective actions given by courts which tell the potential class members you received information that is incorrect or inaccurate and you should disregard it. In fact, you are not being dissuaded from participating and you will have the right to participate and join. That is just an off-the-cuff example of what one might say depending upon what the defendant corporation has said to the class members. There is case law on that.

THE COURT: You would ask me to say -- again your recitation of what you believe is in the e-mail is something to the effect this lawsuit has no merit, don't waste your time?

MR. WITTELS: Right, don't waste your time. It is set out right away after the collective action decision. It is a communication that normally one doesn't have direct communications when there is class certification and here there

is a collective action certification, so everyone is not in the class until they join.

If it were a Rule 23 class and the defendants automatically tried to communicate to class members about any matters, we would be making the same argument. You're trying to dissuade the class members from joining, and that is what we believe is happening here. It is evidence again by the language they're trying to use in their own version of the language designed to try to chill people. You have to pay litigation costs, you're going to be deposed, all things and the other things.

We like to see what they said. If I am not answering, the corrective language would be you received information that was misleading and inaccurate. You have a right to participate and join. You should disregard the notice or the information that was sent to you by the corporation and you will not be penalized or punished or retaliated against for joining. It would be the opposite what the defendants apparently have said.

THE COURT: Both sides of the proposed notice, there is information about not being retaliated against. I am not sure how appropriate it would be for me, again even if this e-mail exists, and even if this e-mail exists what you're saying, the court should say what you received was misleading and wrong. That seems a little strong, doesn't it?

MR. WITTELS: No, your Honor, respectfully. There are

many instances in the case law -- we haven't briefed it -- where plaintiffs have made application to the court for corrective notice, corrections of misleading, incorrect statements.

Whether the court said it, it would be court-sponsored in a sense, the court approving the language, but the court's obligation in monitoring the class action is to ensure there is equities and fairness for both sides, obviously, and to do that and to make sure the class is protected under Rule 23 (f). The court has the power to fashion an appropriate remedy in its monitoring of the class.

THE COURT: It seems like what you're saying when you talk about corrective notice, unless I am misunderstanding, you are talking about including language in the notice to be sent out that would be to correct that misimpression, or are you talking about some separate indication, transmission from the court?

MR. WITTELS: It would not be from the court. It would be the court has approved that this corrective notice go out. If your Honor doesn't do it here, once we eventually got hold of that and if it is what we think, the court would be authorizing a second notice, assuming you approved that it needed to be corrected.

THE COURT: When did plaintiffs find out about this alleged e-mail?

MR. WITTELS: Right after your Honor on June 20 -- well, within a week I believe after that we started hearing about it. We tried to get it and we haven't been able to get it. The reason our plaintiffs can't get it is because the current employees are afraid to give it to them. There is a real fear here among the class members.

THE COURT: Have you raised this with defense counsel before just now?

MS. NURHESSEIN: Actually, your Honor, we have raised it in the context of previous discovery requests we served requesting disclosures, any disclosures, communications made with potential class members, and that's one that had been served a while ago.

We did confirm it. I did bring to their attention we are aware there had been communication that we believe was improper and potentially misleading and coercive. They are taking the position they don't have to produce any of those documents because they're protected by work product.

THE COURT: My real question is this:

We are here today supposedly to deal with this notice. I am trying to find out when did plaintiffs find out about this and what steps did plaintiffs take to notify the defendants about this in relation to the notice or notify the court so we don't end in a situation in which we are wasting everybody's time coming to court if plaintiffs -- my concern is if

plaintiffs knew you were making this request, why not submit something in writing to the court, CC the defendants so that we don't end up in a situation we are trying to go through this notice all for nothing or coming to court for no reason.

Let me get a sense from plaintiffs in terms of, it sounds like you found out about this in advance of today, right?

MR. WITTELS: Yes.

THE COURT: Did plaintiffs -- I haven't received any letter from plaintiffs CC'g the defendants indicating that this is an issue that should be resolved prior to today -- did plaintiffs have any written communications or other communications with defense counsel to discuss this, to figure out if maybe we should have an adjournment of the hearing today?

MR. WITTELS: The short answer to that last question is no. We tried until as recently as yesterday and today to try to get hold of it because we didn't want to bring up an issue if we had it, we could be more accurate about it. Ms. Nurhussein said she tried, as she indicated, to try to get it from defendants by saying that we had heard about it. Defendants have taken the position they won't produce it. Therefore, your Honor's right.

I mean, perhaps it would have been more prudent to have brought it up in a letter format and hashed it out, but we

are asking your Honor now to order that we at least see it so we can know. I don't know that it affects the other language that is in dispute, their version versus our version. The corrected part of it could be an addendum or something at the beginning.

THE COURT: Le me hear from defendants.

MS. CHAVEY: Your Honor, we were never asked to provide the e-mail. We did have a meet-and-confer on Thursday. We spoke with both Mr. Wittels and Ms. Nurhussein. They never asked us for it. I am not sure what e-mail they're referring to.

If they had asked us for it before we came to court, we might have been able to figure it out. There was on Monday morning come to our attention a press release from Sanford Wittels about your Honor's ruling, and that press release was given to a PR news wire which is, as I understand it, some type of media service that then provides news reports to media outlets.

In response to that press release that Sanford Wittels issued, immediately upon the first business day after receiving your ruling, dated June 29th, we felt there were highly misleading portions of the press release, and so MSL did issue a press release, a copy of which we have here if you like me to to hand it up. If that is what plaintiffs are referring to now, I am referring to that. An e-mail went out to everybody

at MSL about participating. I don't know about any such e-mail at all.

MS. NURHESSEIN: Let me clarify one thing. That is not actually correct. I did raise the issue of communication that we had heard of that was potentially misleading and coercive in the context of a broader request about general communications or disclosures made to potential class members.

I didn't go into the specifics because I didn't have a lot of information at the time. As my colleague said, we haven't seen the e-mail. We have gradually acquired information from our clients over the past few days or so, but it was something that was raised on the call.

MS. CHAVEY: Your Honor, this was last week we spoke to plaintiffs' counsel, and they didn't raise this issue. We were discussing in a meet-and-confer context discovery requests that had been issued before. This was never raised. If it had been raised, we would have provided an e-mail. If we could have understood what it was, we could have provided a copy of the press release. I have one here.

This is a pattern of us not knowing before we come to court what plaintiffs are going to ask for, and we have asked plaintiffs' counsel in this courthouse to please confer with us before coming to court and asking for things that they haven't asked us for.

THE COURT: Okay. It appears to me that to the extent

that this e-mail does, in fact, exist, the parties need to sit down and talk about this, try to locate this e-mail so that the parties -- plaintiffs in particular -- can make the appropriate request to the court. So we're going to need to adjourn today's conference. Are the parties available on July the 27th?

MR. WITTELS: What day of the week is that?

THE COURT: A Friday. It is two weeks from this Friday. We can go at 12:15.

MR. WITTELS: Anyway, your Honor, respectfully, do we have to do it next Friday? I am out of the country for two weeks after that. That is the problem.

MR. EVANS: I am out of the country as well starting July 20th to July 29th, as is my colleague, Mr. Stoner, who would otherwise be able to attend in my absence.

THE COURT: The court may available the 20th. The bigger question is I am not sure -- are the parties going to be able to resolve this or get the e-mail by then -- I am not sure that is enough time for the parties to meet and confer.

MR. WITTELS: Plaintiffs are not opposed to a separate corrective notice. In other words, we would like notice to go out because we would like people to join. Their clock is running. We would like notice to go out. We would not like to delay this in that sense. If corrected notice is deemed appropriate, we will ask for it, but we would like your Honor

to rule on the notices today if you so determine.

THE COURT: It seems like, based on what plaintiffs have just indicated, I was prepared to do it, but based on plaintiffs' indication, I don't think that would be particularly appropriate.

I am sure the defendants would object to a second notice, and the court certainly is not in a position at this point to make a determination as to whether or not a second notice or a corrective notice is appropriate. It very well may be possible that any issues that the plaintiffs have could be corrected in this notice, and I would like to do that if at all possible.

If it is necessary to do a second notice, then fine. Let me find out. The court is available on the 20th. I don't know, are the parties going to be able to deal with this issue, get this e-mail and figure out what their positions are going to be by then?

MR. WITTELS: If we get it today, tomorrow, yes, we can come sooner. I can come Monday.

THE COURT: The defendants still need time to look for it and find it. I don't know.

MS. CHAVEY: Based on the description given, an e-mail from Mr. Seconis, I don't think it would take us a long time to figure out if such an e-mail had been sent out. I am available on the 20th, but we would also like to get at the same time, if

we are doing this, getting plaintiffs' counsel or plaintiffs' communications with putative class members because we don't know what the communication is.

We see the press release and we saw the press release on July 2nd, saw the follow-up press release responding to our press release. There is a press tension that plaintiffs' counsel is seeking. What we don't know is whether plaintiffs' counsel has been communicating with, plaintiffs' have been communicating with putative opt-in plaintiffs as well.

THE COURT: Do you have any specific belief there has been some sort of communication or some sort of negative communication from plaintiffs' counsel to the plaintiffs?

MS. CHAVEY: We have the press releases. We do know plaintiffs' counsel have been contacting current and former employees, not since your ruling on June 29th, but we know they have been contacting people and engaging interest in the lawsuit.

MS. NURHESSEIN: That is incorrect, your Honor. I am not aware of us contacting people to engage, Judge, the lawsuit.

THE COURT: The question is, I guess, is it plaintiffs' position that plaintiff has not been communicating by e-mail with potential class action members?

MR. WITTELS: If we are contacted or if a referral is made for us to talk to someone who has information about a

lawsuit involving this matter, it is our obligation as class counsel to talk to those people if they contact us. Defendants seem to think it is nefarious to talk to potential class members about a lawsuit involving discrimination. It is not. In fact, it is our obligation to do that. I would argue and submit that every day that goes on in a class action, so there is nothing wrong with it.

If there is a press battle, that again is not something we're engaging in here. If we issue information publicly, just as the defendants have a right to do it, that is what the country is built on, free press. There is nothing wrong with that. If someone is inaccurate and making misleading statements, that is a different story.

If the defendant, as we have argued to you, may have, we don't have the e-mail, but it is again what we have heard, made suggestions there is nothing to this lawsuit and suggested you shouldn't join it, that is improper. That is different from what we have been doing.

THE COURT: Okay, let's do this. Are the parties available on the 20th, at 10:00 o'clock?

MS. CHAVEY: Yes.

MR. WITTELS: Yes, your Honor.

THE COURT: Okay.

MR. EVANS: We will make ourselves available, your Honor.

THE COURT: Again the plaintiffs have indicated they know there is a specific e-mail they're looking for. They are not looking for all e-mail communications related to this notice. Defendants should look for that e-mail and provide that e-mail if it exists to plaintiffs. Let's have that done by Friday, the 13th.

If, in fact, the e-mail exists and the plaintiffs have the e-mail, again we'll schedule this for the 20th, at 10:00 o'clock, but let's have plaintiffs' counsel, plaintiffs' counsel is going to be asking for some sort of corrective notice or some sort of secondary notice, let's have plaintiff put that in writing, whatever it is you're suggesting, and submit that to the Court and submit that to defense counsel by the 16th. We'll allow defense counsel until the 18th to respond to that and then see where we are on the 20th.

MR. WITTELS: One point. So that we can have, make some headway in advance of next week, would your Honor be inclined at all to go through the notice because there are obviously sharp distinctions here in both sides' positions on language.

THE COURT: No, not with this issue with this e-mail out here. Again I was prepared to do this until again it would be helpful if plaintiffs, if you have an issue like this, raise that ahead of time.

MR. WITTELS: We are sorry.

THE COURT: And the defendants would be prepared to respond and the court would be prepared to do deal with it. I think that would be appropriate. I don't want to go through this notice and have a situation later in which you find this e-mail and there is something that the court feels it may be appropriate to include in the notice as opposed to sending out a second communication from plaintiffs' counsel with the court authorization.

It seems it is best to do this all at one time. It also would be easiest to, if there is going to be a decision, to see about some sort of corrective notice, it would need to be in the context of having conversations about the actual notice in the first place, to see how corrected that notice was being made. Let's have the defendants be able to respond by the 18th?

MS. CHAVEY: Yes, your Honor, we will. Would you be imposing page limits or not on these submissions?

THE COURT: Yes -- the parties can do this by -- yes, I can't imagine why the parties would need more than five pages on this.

MR. WITTELS: That is sufficient.

THE COURT: A five-page limit.

MS. CHAVEY: If there were an e-mail that would fit the description, given it will be privileged, we'll raise that with the court. There have certainly been communications

between client and counsel over the course of this lawsuit, and I don't believe that is what Mr. Wittels is referring to, but I wanted to raise that just to be sure.

THE COURT: Let's do this: Defendants will respond by the 18th and then let's have the parties file a joint status report on the 19th just so that we avoid any other potential delays and find out if there is an issue of privilege or some other issue the parties need more time, so we don't have the parties and the court come here on the 20th and accomplish nothing.

MR. WITTELS: In terms of communications we are concerned with, if there are communications from the lawyers to class members, yes, we would want to see that. If there is a privilege issue, we want to know that.

But if this is instead what we believe, which is from Mr. Seconis or another high executive or company-sponsored person, that is what we believe it is, I apologize for not bringing it up your Honor earlier.

THE COURT: Is there anything else from plaintiffs today?

MR. WITTELS: No, your Honor.

THE COURT: Is there anything else from defendants?

MS. CHAVEY: I do want to say two additional things.

We are concerned about the false and misleading statements that plaintiffs counsel have made through the press

discussing the certification of a class against Publicis Groupe, which is not the case. This was a conditional certification issue. Publicis Groupe, in Footnote 7 of your order, is not part of that. There have been words used to describe the court's ruling which are wrong, they're inaccurate, and particularly since there is a Rule 23 class alleged here, it is very confusing, and our concern is that the confusion, PR people read PR trade press, and our concern is that putative opt-in plaintiffs may be confused about what is going on.

This has been the subject of many prior press releases by plaintiffs' counsel. There has been press generated about it, and we are concerned about misleading and characterizing by plaintiffs' counsel the nature of the court's decision, which was the initial certification of one claim of the vice president and senior vice president, not including managing directors, the language in an e-mail that Publicis and MSL Groupe are now part of a certified class.

THE COURT: What would you be asking me to do about that?

MS. CHAVEY: We would like to know what communications plaintiffs' counsel have had with potential opt-in plaintiffs, and we would like the court to require the plaintiffs not to communicate in ways, in any way with putative opt-in plaintiffs at this point about the lawsuit because the statements that

have been made in the press that obviously are directed to these individuals have been false and misleading.

THE COURT: Does that have any bearing on the notice? Again what is it you ask me to do?

MS. CHAVEY: We ask the court to require plaintiffs' counsel not to communicate with potential opt-in plaintiffs in the Equal Pay Act claim in any way about this lawsuit because there has already been an indication that has been confusing and misleading about the nature of the court's rulings.

THE COURT: In any way?

MS. CHAVEY: Yes. The purpose of the notice that the court has permitted is to offer a communication avenue with this group of people. Any side communications by plaintiffs' counsel directly to these individuals that are misleading, confusing are not appropriate.

THE COURT: Okay.

MS. CHAVEY: It obviates the need for the notice of plaintiffs' counsel -- they do have the vast majority of the names and all personal information of the people in this group. They certainly have the access to these individuals, unlike in many FSLA cases where the conditional certification comes so early in the case, that there isn't that kind of access yet.

THE COURT: Plaintiffs' position on that?

MR. WITTELS: We have never heard an argument from a defendant in a courtroom that the plaintiffs may not

communicate with potential class members who have a right to join and seek counsel. The suggestion that we made misleading statements is completely inaccurate. If anyone has made misleading statements, it is statements in defendants' press release where they say the EEOC dismissed the claims in 2010. They weren't dismissed. The EEOC said they needed more information and gave us the right to sue.

We are not here to debate press releases; we are here to proceed with the lawsuit, get notice out to the claim class and invite anyone who wants to join. That is the purpose of the notice. We are not trying to chill people, and they're trying to clamp down on our right to communicate with class members.

THE COURT: From defendants' perspective, let me make sure I am understanding this action that you want me to take again has no bearing on this notice, correct?

MS. CHAVEY: It is related to the notice because the notice should be the means of communication about the group's opportunity.

THE COURT: The content of the notice, this doesn't have any bearing on the content of the actual notice, correct?

MS. CHAVEY: That's right. What we are really talking about is communications outside of the notice by plaintiffs' counsel that are false and misleading and confusing and serve to generate misinformation about what the nature of the court's

rulings has been.

THE COURT: We can deal with that at a later time. Go ahead and try to get this issue with the notice resolved. If the parties wish to submit the press releases to the court, go ahead and submit those as well. Submit those. They're not technically related to the notice, but go ahead and submit those as exhibits to your five-page-limited motions regarding this e-mail issue, okay.

MS. CHAVEY: Your Honor, as we are looking for the e-mail that Mr. Wittels has described, may we also ask plaintiffs to provide to us their communications with potential opt-in plaintiffs?

THE COURT: No, not in a general sense.

If there is something specific that you're looking for, that is fine. Plaintiffs have made a showing, at least come forward and indicated they believe there is a particular e-mail that they feel would be misleading and unfair in its statements. If they have any specific e-mails or communications that you're concerned about, certainly you can raise that with the court. As a general matter, no.

MS. CHAVEY: Thank you. We will.

THE COURT: Is there anything else from plaintiffs?

MR. WITTELS: No, your Honor.

THE COURT: Is there anything else from defendants?

MS. CHAVEY: No, your Honor.

THE COURT: Thank you very much.

Make sure the parties give me a status report on the 19th so I know all the issues.

(Court adjourned)